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In the Supreme Court of the United States

OCTOBER TERM, 1979

SETH O. SPARKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 20-25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1979. The petition for a writ of certiorari was filed on December 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial because the trial judge did not question the prospective jurors concerning racial prejudice.

2. Whether certain evidence provided by petitioner in noncustodial interviews with Internal Revenue Service agents should have been suppressed because he was not given full *Miranda* warnings.

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of forging a United States Treasury check, in violation of 18 U.S.C. 495; stealing government property, in violation of 18 U.S.C. 641; and presenting false claims against the government, in violation of 18 U.S.C. 287. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. 20-25).

Petitioner was an income tax adviser and tax refund discounter in Hobbs, New Mexico. The evidence at trial showed that on two occasions petitioner filed income tax returns using another person's name and W-2 form but his own address in order to obtain the refund checks. One of the checks was mailed to petitioner, who endorsed it and deposited it in his own account. In each case, the taxpayer testified that he had not received his W-2 form, that he had never met petitioner, and that he had not authorized petitioner to file a tax return on his behalf or to collect the refund check (Pet. 21-22, 25).

ARGUMENT

1. Prior to jury selection, petitioner submitted several proposed voir dire questions to the trial judge concerning the possible racial prejudice of the prospective jurors. Although petitioner does not contend that any juror was in fact biased against him, he argues (Pet. 8-11) that the

district court's failure to ask these questions denied him a fair trial. Petitioner never objected to the court's voir dire or the jury panel that was selected, however, and in such circumstances petitioner must be deemed to have waived his claim. See, *e.g.*, Fed. R. Crim. P. 12(f); *United States* v. *Blosvern*, 514 F. 2d 387, 388-389 (9th Cir. 1975); *United States* v. *Walker*, 491 F. 2d 236, 239 (9th Cir.), cert. denied, 416 U.S. 990 (1974). See also *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 362 (1963); *Frazier* v. *United States*, 335 U.S. 497, 503 (1948). Otherwise, defendants could use the voir dire to set a "trap for an unwary judge." The defendant would simply propose various voir dire questions and then, if the trial judge failed to ask all of the questions, he would claim reversible error on appeal, even though the trial judge did not have a timely opportunity to avoid such error. *United States* v. *Blosvern*, *supra*, 514 F. 2d at 389.

In any event, the court of appeals correctly concluded that the voir dire in this case did not deprive petitioner of a fair trial (Pet. App. 22). The trial court, which is vested with broad discretion in conducting the voir dire (see, *e.g.*, *Ristaino* v. *Ross*, 424 U.S. 589, 594-595 (1976); *Ham* v. *South Carolina* 409 U.S. 524, 527-528 (1973)), repeatedly asked the jurors whether "you have any prejudices in this kind of a case" and whether there is "any reason why you couldn't sit as fair and impartial jurors and render a fair and impartial verdict between the government on the one hand, and the defendant on the other?" See Tr. 844, 850, 853, 855-856, 858, 860-861, 862-863, 864-865. Although we believe it would have been better practice for the court in addition to ask the questions proposed by petitioner (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9; *United States* v. *Walker*, *supra*, 491 F. 2d at 239), "[t]he

Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters [such as racial bias] that conceivably might prejudice veniremen against him." *Ristaino* v. *Ross*, *supra*, 424 U.S. at 594. Here, as in *Ristaino*, there is no "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]." *Id.* at 596.

To be sure, the Court indicated in *Ristaino* that, as a matter of its supervisory power, it would have required the trial judge to propound appropriate questions to the jury concerning racial prejudice in the circumstances of that case. *Id.* at 597 n.9. But *Ristaino* involved a black defendant accused of committing violent crimes against a white victim. *Id.* at 590-591. Here, in contrast, petitioner was convicted of a non-violent crime and the victim was the government. The court of appeals therefore properly refused to overturn petitioner's convictions, particularly in light of his failure to make a proper objection. See, *e.g.*, *United States* v. *Polk*, 550 F. 2d 1265 (10th Cir.), cert. denied, 434 U.S. 838 (1977); *United States* v. *Diggs*, 522 F. 2d 1310, 1317-1319 (D.C. Cir. 1975); *United States* v. *Walker*, *supra*, 491 F. 2d at 239. See also *United States* v. *Grant*, 494 F. 2d 120 (2d Cir.), cert. denied, 419 U.S. 849 (1974) (voir dire harmless error).

As petitioner points out (Pet. 10), at least two courts of appeals have recently exercised their supervisory powers to require the trial judge to question jurors regarding racial bias whenever the defendant requests such a voir dire and regardless of the circumstances of the case. See, *e.g.*, *United States* v. *Williams*, 612 F. 2d 735, 736-737 (3d Cir. 1979); *United States* v. *Bowles*, 574 F. 2d

970, 972-973 (8th Cir. 1978). See also *United States* v. *Booker*, 480 F. 2d 1310 (7th Cir. 1973); *United States* v. *Gore*, 435 F. 2d 1110, 1112 (4th Cir. 1970); *Frasier* v. *United States*, 267 F. 2d 62, 66 (1st Cir. 1959). Although such a sweeping per se rule appears inconsistent with the tenor of this Court's analysis in *Ristaino* (see 424 U.S. at 596 n.8 & 597 n.9), we believe that this is an area in which a difference among the courts of appeals as to the exercise of their respective supervisory powers is tolerable and does not warrant this Court's review. Some courts of appeals find it convenient to adopt a per se rule, thereby obviating the need to review each claim of jury prejudice on a case-by-case basis. Others, like the court below, prefer to review each voir dire to ensure that each defendant has had a fair trial. The difference in approach simply involves preferences in matters of judicial administration and does not threaten the rights of criminal defendants to obtain a fair trial.

2. Petitioner further contends (Pet. 13-16) that certain statements and documents should have been suppressed because Internal Revenue Service agents did not properly inform him of his *Miranda* rights at several interviews. However, as the courts below found, these interviews occurred at petitioner's home and business under non-coercive circumstances (Pet. App. 22-24; Tr. 14-40). Moreover, the agents read petitioner the modified *Miranda* warnings expressly approved by this Court in *Beckwith* v. *United States*, 425 U.S. 341 (1976), and

petitioner thereafter signed a waiver of rights form (Tr. 14-15, 33-34). Accordingly, the district court correctly admitted the challenged evidence at trial.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[1]There is also no merit to petitioner's claim (Pet. 11-13) regarding the grand jury's request for a handwriting exemplar. See, *e.g.*, *United States* v. *Euge*, No. 78-1453 (Feb. 20, 1980), slip op. 10-11; *United States* v. *Mara*, 410 U.S. 19 (1973); *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967).

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